LIBRARY
SUPR...

Office-Supreme Court, U.S.
FILED
SEP 6 1962
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 333

THEATRE CONTROL CORPORATION, a Michigan Corporation; SAUL KORMAN, d/b/a Apollo Theatre; WESTOWN THEATRE CORPORATION, a Michigan Corporation; HILLIER KILBRIDE Company, a Michigan Corporation, and all other members of the class,

Plaintiffs and Appellees,

and

ACF-WRIGLEY STORES, INC., a Delaware Corporation; DAVIDSON BROTHERS, INC., a Michigan Corporation; LOCAL 575, INTERNATIONAL BROTHERHOOD OF BRIDGE, STRUCTURAL AND STEEL WORKERS OF AMERICA, AFL-CIO,

Intervening Plaintiffs and Appellees,

v.

CITY OF DETROIT, a Municipal Corporation; BOARD OF WATER COMMISSIONERS of the City of Detroit; OSCAR A. WAGNER, Commissioner; GEORGE A. SHAFFER, Commissioner; ALFRED J. SIMPSON, Commissioner; HARVEY A. WAGNER, Commissioner; GERALD J. REMUS, General Manager of the Detroit Department of Water Supply,

Defendants and Appellants.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

(For List of Attorneys see inside front cover)

Interstate Brief & Record Co., 356 Congress St. E., Detroit 26, Michigan

LIST OF ATTORNEYS

ROBERT REESE,
Corporation Counsel,
VANCE G. INGALLS,
Assistant Corporation Counsel,
Attorneys for Defendants and Appellants,
1010 City-County Building
Detroit 26, Michigan.

WILLIAM HENRY GALLAGHER,
3005 Cadillac Tower,
Detroit 26, Michigan.
DAVID NEWMAN,
1001 Fox Building,
Detroit 1, Michigan.
REYMONT PAUL,
3005 Cadillac Tower,
Detroit 26, Michigan,
Attorneys for Plaintiffs and Appellees.

IRWIN I. COHN,
(JOHN SKLAR, of Counsel),
Attorney for ACF Wrigley Stores, Inc.,
and Davidson Bros. Inc. Intervening
Plaintiffs and Appellees,
2290 First National Building,
Detroit 26, Michigan.

DONALD J. PREBENDA,
Attorney for Local 575, International
Brotherhood of Bridge, Structural and
Steel Workers of America, AFL-CIO
Intervening Plaintiff and Appellee,
2550 Guardian Building,
Detroit 26, Michigan.

SUBJECT INDEX

	Page
A. This Court Should Not Take Jurisdiction to Review the Michigan Supreme Court's Decision Since it is Based Upon an Adequate State Ground	2-3
B. Reasons for Not Granting Writ	4
C. Conclusion	5

INDEX TO AUTHORITIES CITED

Central Savings Bank v. New York, 279 N. Y. 266, 280 N. Y. 9, 18 N.E. 2nd 151, 19 N.E. 2nd 659, 121 A.L.R. 607	3
City of New York v. Central Savings Bank, 306 U. S. 661, 83 L. Ed. 1058	3
Flournoy v. Weiner, 321 U. S. 253, 88 L. Ed. 709	3
Fox Film Corp. v. Miller, 296 U. S. 207-1, 80 L. Ed. 158	2
Law Edition 1200 at 1203, Note 100	3
Lynch v. New York ex rel. Pierson, 293 U. S. 52, 79 Law Ed. 191	2

CONSTITUTIONS

Michigan Constitution 1908, Art. 2, Pars. 1 and 16	2
United States Constitution, Amendment 14, Par. 1	2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 333

THEATRE CONTROL CORPORATION, a Michigan Corporation; SAUL KORMAN, d/b/a Apollo Theatre; WESTOWN THEATRE CORPORATION, a Michigan Corporation; HILLIER KILBRIDE Company, a Michigan Corporation, and all other members of the class,

Plaintiffs and Appellees,

and

ACF-WRIGLEY STORES, INC., a Delaware Corporation; DAVIDSON BROTHERS, INC., a Michigan Corporation; LOCAL 575, INTERNATIONAL BROTHERHOOD OF BRIDGE, STRUCTURAL AND STEEL WORKERS OF AMERICA, AFL-CIO,

Intervening Plaintiffs and Appellees,

v.

CITY OF DETROIT, a Municipal Corporation; BOARD OF WATER COMMISSIONERS of the City of Detroit; OSCAR A. WAGNER, Commissioner; GEORGE A. SHAFFER, Commissioner; ALFRED J. SIMPSON, Commissioner; HARVEY A. WAGNER, Commissioner; GERALD J. REMUS, General Manager of the Detroit Department of Water Supply,

Defendants and Appellants.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

A. THIS COURT SHOULD NOT TAKE JURISDICTION TO REVIEW THE MICHIGAN SUPREME COURT'S DECISION SINCE IT IS BASED UPON AN ADEQUATE STATE GROUND

The opinion of the Michigan Supreme Court states:

> "Stated simply, the principal question is whether defendants may impose an additional annual demand charge only upon users of nonrecirculating air-conditioning equipment used for human or animal comfort without violating constitutional rights of due process and equal protection of the law.* * * *"

---

*"Mich. Const. 1908, art. 2, pars. 1 and 16; U. S. Const., am. 14, par. 1 (page 15 of Petition for Writ.)"

The Michigan Supreme Court then proceeded to analyze the facts which gave rise to this question and concluded:

> "Having concluded there was no reasonable basis for the additional demand charge here sought to be imposed, it necessarily follows that such charge was unreasonable and arbitrary and therefore invalid, because it deprived plaintiffs of property without due process of law." (Page 22 of Petition for Writ.)

Thus, the Michigan Supreme Court expressly rested its decision on both an adequate State ground and a Federal ground. That this Court will not grant a review of the State Court's decision which is based on an adequate State ground, is well established.

Lynch v. N. Y. Ex Rel Pierson, 293 U. S. 52, 79 Law ed., 191;

Fox Film Corp. v. Miller, 296 U. S. 207-1, 80 L. ed., 158;

City of N. Y. v. Central Savings Bank, 306 U. S. 661, 83 L. ed. 1058;

Flournoy v. Weiner, 321 U. S. 253, 88 L. ed. 709.

Note 100 Law Ed. 1200, at 1203.

A precise parallel of the instant situation is found in *Central Savings Bank v. New York*, 279 N. Y. 265, 280 N. Y. 9, 18 N.E. 2nd, 151, 19 N.E. 2d, 659, 121 A.L.R. 607. In that case a New York Statute authorized the State Building Department to require alterations to multiple dwellings and gave priority over existing mortgages to liens imposed upon the premises for the expenses of such alterations. The question presented was whether the statute deprived the mortgagees of property without due process of law. The New York Court filed an opinion holding that there was a failure of due process. Later, with the apparent purpose of inviting a review by the U. S. Supreme Court, it filed a supplementary opinion in which it stated:

> "A question under the federal constitution was duly presented and necessarily passed upon by this court."

Application for certiorari was then made to the U. S. Supreme Court which was denied for the reason that the judgment of the New York Court rested upon a non-federal ground (violation of the State Constitution's due process clause) adequate to support it. 306 U. S. 661, 83 L. Ed. 1058.

B. REASONS FOR NOT GRANTING WRIT

While the lack of jurisdiction in this Court is decisive of the application now presented, we are impelled to point out that the reasons urged by the petitioners for granting the writ are without force.

Petitioners assume that the instant case is a rate case. They then urge that the decisions of this Court in rate cases are involved and that the Michigan Court's decision may adversely affect municipalities and other public utilities in the establishment of their rates.

The fact is that this is not a rate case. There was no challenge to the rates imposed upon the respective customer classifications provided for in the rate schedule. The challenge was to a demand charge over and above and in addition to the established rates provided for in the respective customer classifications, said demand charge being computed, not on water actually used, by air conditioning equipment, but on its *potential capacity* (i.e. tonnage) for using water, irrespective of whether the ratepayer used much or *none*.

C. CONCLUSION

We submit that the petition for writ of certiorari should be denied for the following reasons:

(1) this Court should not grant a review of a decision, resting on an adequate state ground;

(2) the petition does not show any special or important reasons for the granting thereof.

Respectfully submitted

WM. HENRY GALLAGHER,
Attorney for Respondents,
3005 Cadillac Tower,
Detroit 26, Michigan.

JOHN SKLAR,
Attorney for ACF Wrigley Stores, Inc., and Davidson Bros., Inc., Intervening Plaintiffs and Appellees,
2290 First National Building,
Detroit 26, Michigan.

DONALD J. PREBENDA,
Attorney for Local 375, International Brotherhood of Bridge, Structural and Steel Workers of America, AFL-CIO Intervening Plaintiff and Appellee,
2550 Guardian Building,
Detroit 26, Michigan.

Dated: September 1, 1962.